(9)

No. 85-1563

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

ALBERT GREENWOOD BROWN, JR.,
Respondent.

On Writ Of Certiorari To The Supreme Court of California

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether an instruction at the penalty phase of a capital trial directing the jury not to be swayed by sympathy violates the Eighth and Fourteenth Amendments where the defendant has presented mitigating evidence and has focused his plea for a sentence less than death on the jury's consideration of the sympathetic aspects of his background and character.

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STATEMENT OF THE CASE

Respondent accepts the state's statement relative to the guilt trial. The issue presented in this case, however, requires a more detailed statement relative to the evidence from the penalty trial.

Aggravating Evidence

In 1977, respondent entered a Riverside home intending to burglarize the place. He found fourteen-year-old Kelly home alone. Respondent raped the girl and left; he was arrested within minutes. (RT 6188-6210, 6394, 6497.) Respondent was charged with rape. He pleaded guilty to avoid causing Kelly the additional pain of having to testify at trial. (RT 6499.)[1] Respondent was sentenced to prison, where he served over three years before he was paroled. (RT 6216).

Mitigating Evidence

In an effort to "allow people on the jury to get to know [respondent] as a person" (JA 52), ten members of his family testified. His parents, stepsiplings, cousins, aunts, and uncles indicated respondent was a quiet, attentive, loving child, teenager, and young adult who tried hard to be accepted by others. (JA 38-39, 40, 46, 50, 54; RT 6240, 6261, 6273, 6290.) Respondent's parents divorced when he was six years old; the divorce was very acrimonious, and respondent's mother did not often allow her son to see his father. (JA 53, 56.)

Respondent joined the Marine Corps when he left high school and served for four years. He wrote regularly to his

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[1] When Kelly was called to testify at respondent's penalty trial, respondent chose to stay in the judge's chambers to avoid causing Kelly any pain or discomfort facing him might present. (RT 6171-6172, 6500.)

family, complaining sometimes about the way blacks were treated and of problems he had with the Ku Klux Klan. (JA 60, 63, 69; RT 6246, 6306, 6314, 6362-6366, 6402, 6489-6492.)

It was while respondent was in the Marine Corps that his friends paid for a prostitute for him and he experienced his first sexual encounter. (JA 70; RT 6403, 6413.) Respondent's mother had taught him that sex was "dirty" and if he engaged in "dirty things" with girls, his fingers would fall off and one of his legs would become shorter. (JA 73; RT 6404.) Respondent's uncle was missing one of his fingers, and respondent believed it was because his uncle had done something dirty with girls when he was younger. *(Ibid.)*

Dr. Robert Summerour, a psychiatrist who interviewed respondent several times, testified that relationships with women were very important to respondent. Respondent likes women and wants to protect them but is too afraid to get physically close with them, for he believes his sexual desires are bad. He has experienced a severe impotence problem throughout his life. (JA 70-71; RT 6403, 6408, 6413.)

Dr. Summerour believed respondent's behavior was sexually and not violently motivated and arose from his sexual problems. (JA 70-77; RT 6402-6414.) He believed respondent's criminal activity was motivated by his sexual desires which were impaired by his fear of sexual contact with women. (JA 80; RT 6412.)

Respondent was ashamed and afraid to face his problems. (JA 84; RT 6414.) He felt unable to talk to his father, whom he idealized, about his impotence. (JA 69, 74; RT 6402, 6404); and he believed his mother hated him because he reminded her of his father. (RT 6399, 6402.)

Dr. Summerour indicated respondent exhibited a desire to be caught (RT 6397, 6419) and was ashamed of his criminal conduct to the point he could not face his victims. (RT 6395, 6415, 6461.) The doctor did not believe respondent was a sociopath, pointing out respondent regularly held a job, he valued education, and he maintained close relationships with family members. (JA 82).

Respondent received no treatment for his problems during his prison term for the rape of Kelly. (RT 6417.) His family visited him regularly and respondent wrote letters and sent artwork to his stepbrother and stepsister. (RT 6279, 6286, 6292, 6296, 6374.)

When respondent was paroled, he re-enrolled in college and obtained a job. (RT 6503.) He reported regularly to his parole officer. (RT 6220.)

All respondent's family members testified they loved respondent and would visit him in prison; they asked the jury to show mercy. (JA 52, 68; RT 6270, 6276, 6280, 6293, 6513.)

Respondent, testifying on his own behalf, told the jury he was ashamed of his prior criminal conduct. (RT 6496, 6498-6500.) He asked the jury to show mercy for him. (RT 6507.)

SUMMARY OF ARGUMENT

After being found guilty of murder with special circumstances, and thus death eligible, respondent proceeded to the penalty phase of his trial where the jury would choose between death and life imprisonment without possibility of parole. At the penalty trial, respondent produced much evidence as to his unhappy upbringing and emotional and psychosexual problems. He based his plea for his life on the jury's consideration of the sympathetic aspects of this

background and character evidence and the hope that they would be compassionate and merciful.

There cannot be any real dispute that respondent had a constitutional right to the jury's consideration of this evidence. In a series of cases starting with *Woodson* v. *North Carolina*, 428 U.S. 280 (1976), this Court has held that the Eighth and Fourteenth Amendments require that the jury "not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." (*Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978); see also *Eddings* v. *Oklahoma*, 455 U.S. 104; *Skipper* v. *South Carolina*, 476 U.S. ___, 90 L.Ed.2d 1 (1986).) The state may not, consistent with the Constitution, exclude from consideration "the possibility of compassionate or mitigating factors stemming from the diverse frailities of humankind." (*Woodson* v. *North Carolina*, *supra*, 428 U.S. 280, 304.)

Respondent was permitted to introduce all his mitigating evidence. However, the instructions given to the jury, and the argument made by the prosecutor, precluded the jury from considering that evidence. The jury was given a finite list of factors to consider, none of which concern background and character evidence. (JA 20-23.) The jury was then told to confine their consideration to the factors "upon which you have been instructed." (JA 23.) And the jury was expressly cautioned that they were not to be influenced by sympathy. (JA 20.)

In voir dire and in closing argument the prosecutor repeatedly told the jury the law forbade any consideration of sympathy. He advised them that respondent's mitigating evidence was nothing more than a plea for sympathy and mercy and, as such, was entirely irrelevant to the

penalty determination. (JA 29-34, 85-96.) The instructions provided the jury fully supported the prosecutor's argument that respondent's mitigating evidence could not be considered by restricting the jury's consideration to the circumstances of the crime and precluding the consideration of the sympathetic aspects of the background evidence.

The California Supreme Court held that the anti-sympathy instruction, when combined with the other restrictive penalty instructions, was "calculated to divert the jury from its constitutional duty to consider [the background and character evidence]." (*People* v. *Brown*, 709 P.2d 440, 453 (1985).)

The state contends that the antisympathy instruction means the jury is not to consider only untethered sympathy and that the instructions as a whole advise the jury of their duty to consider evidence relating to the offense or the offender. The instructions, however, do not *say* what the state contends they mean.

The antisympathy instruction is not restricted to untethered sympathy. It tells the jury not to be swayed by sympathy; that would include, of course, sympathy based on the mitigating evidence as well as untethered sympathy. Yet respondent had a constitutional right to the jury's consideration of their sympathetic and compassionate response to his background and character evidence.

Nor did any of the other penalty instructions advise the jury to consider respondent's mitigating evidence. Rather, all the factors the jury was told to consider and be guided by related, by their express terms, to respondent's present or prior criminal activity. Since the jury was advised to consider only these factors upon which they were instructed, it would be nothing more than specula-

tion to assume the jury considered respondent's mitigating evidence.

The California Supreme Court reviewed the antisympathy instruction in the context of the California capital sentencing scheme and the other penalty instructions. The court considered the ultimate effect of the instructions and the state's experience with them and concluded the instructions operated to divert the jury from its duty to consider the profferred mitigating evidence.

The Attorney General does not dispute the principle that the jury must consider a capital defendant's mitigating evidence. He takes issue only with the California Supreme Court's interpretation of the antisympathy and other instructions. The Attorney General's interpretation of the instructions is totally unsupported by any facts or experience. The court's interpretation, however, is supported by the literal wording of the instructions, by the prosecutor's argument in this case, and by the experience the court has had in other cases with similar instructions.

The California Supreme Court has not purported to go beyond the principles of *Woodson*, *Lockett*, and *Eddings*, which it cited only as defining the jury's duty to consider the mitigating evidence. Nor has it held that the Constitution requires consideration of sympathy factors unrelated to the background and character evidence. The court merely interpreted the instructions as precluding the jury's consideration of sympathy factors based on the mitigating evidence.

This Court has repeatedly encouraged state appellate courts to "mediate federal constitutional concerns and state interests" in the first instance. (*Moore* v. *Sims*, 442 U.S. 415, 430 (1979); see also *Smith* v. *Murray*, 477 U.S. ___, 91 L.Ed.2d 434 (1986); *Sumner* v. *Mata*, 449 U.S. 539 (1981), 455 U.S. 591 (1982); *Rose* v. *Lundy*, 455 U.S. 509 (1982). The California Supreme Court has done just that, conscientiously and with the support of solid reasoning and long experience. It hardly comports with sound federalism to ignore their interpretation of state jury instructions and reverse their judgment on the basis of the competing interpretation advanced by the state with no support.

ARGUMENT

THE CALIFORNIA SUPREME COURT CORRECTLY CONCLUDED THAT THE INSTRUCTIONS AND THE PROSECUTOR'S ARGUMENT FORECLOSED JURY CONSIDERATION OF RESPONDENT'S MITIGATING EVIDENCE

A. Introduction

After respondent presented his mitigating evidence relating his unhappy and troubled upbringing and emotional disturbances, the jury was instructed upon how to reach their decision between life and death. They were given a list of factors, all relating to present or prior criminal activity, to consider:

> "(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true.
>
> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.
>
> (c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." (JA 21-23.)

The jury was then told how to reach their penalty decision.

> "After having heard all of the evidence, an [sic] after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances *upon which you have been instructed.*" (JA 23; emphasis added.)

The jury was also expressly cautioned not to be influenced by sympathy.

> "You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." (JA 20.)

The prosecutor exploited these instructions in his argument to the jury, repeatedly telling them that the law forbade any consideration of sympathy and that respondent's mitigating evidence was entirely irrelevant to any of the factors they were to consider in reaching a penalty determination. (JA 85-96.) He told the jury that the defense witnesses and evidence were nothing more than "a blatant attempt" to inject sympathy into the case, but "[a]s the Judge will instruct you, you must not be swayed by sympathy." (JA 90-91.)

The California Supreme Court concluded that the anti-sympathy instruction combined with the restrictive standard list of factors to consider was "calculated to divert the jury from its constitutional duty to consider 'any [sympathetic] aspect of the defendant's character or record,' whether or not related to the offense for which he is on trial, in deciding the appropriate penalty." (*People* v. *Brown*, *supra*, 709 P.2d 440, 453.)

Contrary to the state's contention, this case does not present an issue of the propriety of untethered sympathy. At no stage of these proceedings has respondent argued that the jury may be influenced by untethered sympathy, and the California Supreme Court has expressly held that untethered sympathy is not a proper consideration.

The state does not dispute respondent's contention and the California Supreme Court's holding that respondent had a right to the benefit of the jury's sympathetic response to his mitigating evidence. The state's only dis-

pute with the California Supreme Court involves the interpretation of the jury instructions given. The state contends the instructions allowed consideration of respondent's mitigating evidence and precluded only the consideration of untethered sympathy, but the California Supreme Court has interpreted the instructions as denying respondent the benefit of his mitigating evidence. The state court's interpretation is based on its long experience with such instructions, and this Court should defer to that court on the point. (See *California* v. *Ramos*, 463 U.S. 992, 1010, fn. 24 (1983).[2])

B. Respondent Was Entitled To The Jury's Sympathetic Consideration Of His Mitigating Background And Character Evidence

The state, respondent, and the California Supreme Court all agree that respondent was entitled to the jury's sympathetic consideration of his mitigating background and character evidence. Nevertheless, the jury was instructed:

> "You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling." (JA 20.)

The California Supreme Court held that this instruction frustrated respondent's right to have the jury react sympathetically to the mitigating evidence.

The state contends the instruction "means the trier of fact is not to decide the case based upon unfettered or

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[2] In *Ramos* this Court had before it a California penalty phase instruction concerning the Governor's authority to commute a sentence. This Court found the wording of the instruction was ambiguous and deferred to the state Supreme Court's interpretation of the instruction.

untethered emotions unrelated to the facts and circumstances of the offense or the offender." (Petitioner's Brief, pp. 48-49.) However, that is not what the instruction *says*.[3]

Nothing in the instruction given the jury suggests untethered sympathy is inappropriate but sympathy in response to the mitigating evidence is acceptable. The instruction tells the jury not to consider sympathy, without any hint or suggestion that there are different types of sympathy, some which may be considered. Indeed, in grouping sympathy with conjecture, passion, and prejudice, which even most laypersons understand are inappropriate considerations, the instruction quite clearly conveys to the jury that sympathy is an unacceptable consideration and must be avoided.

The state's interpretation of the antisympathy instruction is unsupported either by the wording of the instruction or the California experience with it. The California Supreme Court has expressed agreement with the state's

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[3] In its petition for certiorari, the state stressed the word "mere" in the instruction, contending it told the jury to put aside only "mere" sympathy and suggesting it had no impact on sympathy rising above the level of mere. As respondent points out in the text, the instruction does not indicate there are different types of sympathy, some which may be considered and some which may not. There is, however, an additional problem with the argument that "mere" is significant.

The instruction tells the jury not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling." Read fairly, however, the "mere" modifies only sentiment and not sympathy and the other terms. If "mere" modified all the terms, the jury would be told not to consider, for example, "mere prejudice," implying prejudice itself was a proper consideration as long as it rose above the level of "mere prejudice." Such a reading, however, is absurd. The logical reading is that no prejudice, passion, or sympathy of *any* kind may be considered.

position that a jury may not base its verdict on factually untethered sympathy. (*People* v. *Lanphear*, 680 P.2d 1081, 1084, fn. 1 (1984); *People* v. *Easley*, 671 P.2d 813, 824 (1983).) That court, however, has specifically rejected the state's interpretation of the antisympathy instruction, noting that the instruction is not limited to factually untethered sympathy. (*People* v. *Easley, supra*, 671 P.2d at p. 824.) Rather, the court has considered the antisympathy instruction in the context of the California statutory scheme and other instructions given to the jury and concluded that the instructions operate "to divert the jury from its constitutional duty to consider 'any [sympathetic] aspect of the defendant's character or record.'" (*People* v. *Brown, supra*, 709 P.2d 440, 453.)

The state implies that allowing the jury to be influenced by sympathy would violate *Furman* v. *Georgia*, 408 U.S. 238 (1972), which held standardless sentencing power unconstitutional. The state, however, misunderstands not only the impact of the antisympathy instruction given here but also the very purpose of capital sentencing discretion.

In *Witherspoon* v. *Illinois*, 391 U.S. 510, 519 (1968) this Court held that "a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death." The conscience of the community is expressed at a penalty trial when the jury considers the sympathetic response the defendant's mitigating evidence may stir and decides whether that calls for the exercise of mercy and compassion.

Historically, sympathy, compassion, and mercy have been considered indispensable to the jury's choice

between life and death. (*McGautha* v. *California*, 402 U.S. 183 (1971); *Andres* v. *United States*, 333 U.S. 740 (1948).) In *McGautha*, Justice Harlan traced the history of the use of sympathy and mercy in penalty determinations. He noted the "compassionate purposes of jury sentencing in capital cases" (402 U.S. at 221) and recognized that discretion was introduced into such sentencing as a mechanism for dispensing mercy. (See, generally, 402 U.S. at 197-208.)

The capital sentencing schemes upheld by this Court since *Furman* have varried in the degree of discretion given the jury. (Compare the absolute discretion once death eligibility is established in the Georgia statute reviewed in *Zant* v. *Stephens*, 462 U.S. 862 (1983) with the relatively limited discretion in answering three questions in the Texas statute reviewed in *Jurek* v. *Texas*, 428 U.S. 262 (1976).)[4] This Court has consistently recognized, however, that a penalty jury is called upon to make a "highly subjective" determination (*Turner* v. *Murray*, 476 U.S. ___, 90 L.Ed.2d 27, 35 (1986)) requiring "substantial discretion" (*Caldwell* v. *Mississippi*, 472 U.S. ___, 86 L.Ed.2d 231, 242 (1985)) and has expressly noted that "[n]othing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." (*Gregg* v. *Georgia*, 428 U.S. 153, 199 (1976).)

Nothing in *Furman* precludes a penalty jury from considering their sympathetic response to the mitigating evidence in deciding whether to exercise mercy. This

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[4] The statute upheld in *Jurek* requires imposition of a death sentence if the jury finds beyond a reasonable doubt the answer to three questions is yes. Even under this fairly restrictive system, the jury retains a "wide range of judgment and discretion." (*Adams* v. *Texas*, 448 U.S. 38, 46 (1980).)

Court has upheld capital sentencing schemes which expressly allow for the consideration of sympathy and mercy. The statute upheld in *Jurek*, for example, had been construed by the Texas Court of Criminal Appeals as authorizing the exercise of mercy, which the court described as "one of the fundamental traditions of our system of criminal jurisprudence." (*Jurek* v. *State*, 522 S.W.2d 934, 940 (1975).) Similarly, the Georgia statute upheld in *Gregg* permitted the jury to make a binding recommendation of mercy even though it found no mitigating circumstances in the case. (428 U.S. at 197.)[5]

Commentators, too, have discussed the need for and propriety of jury consideration of sympathy and mercy in deciding between life and death for an individual. "[T]he real issue involved at the penalty trial is whether the jury will be sympathetic to the defendant and give him a life sentence, or will be morally outraged at the defendant and condemn him to death . . ." (Comment, *The Death Penalty Cases*, 56 Cal.L.Rev. 1268, 1410 (1968).) Thus, the goal of defense counsel is usually to persuade the jury to look with sympathy on the defendant. (See, generally, Balske, *New Strategies for the Defense of Capital Cases*, 13 Akron L.Rev. 331 (1979).)

The Attorney General does not suggest that an instruction which had the effect of denying respondent the benefit of the jury's sympathetic response to the mitigating evidence would be constitutional; he merely disagrees with the California Supreme Court interpretation of the

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[5] Most recently this Court recognized the propriety of the consideration of mercy in the penalty determination in *Darden* v. *Wainwright*, 477 U.S. ____, 91 L.Ed.2d 144 (1986) which held counsel did not render ineffective assistance at the penalty trial when he chose to rely on a plea for mercy.

instruction and stakes his entire argument on the proposition that the antisympathy instruction means what he says it means rather than what the state court has found it means.

In resolving the dispute about the meaning of the instruction, this Court should keep in mind that the California Supreme Court has addressed the ultimate effect and historical context of the instruction and "careful consideration [should be given] its views because they concern the purpose, scope, and operative effect of a provision of . . . California [law]." (*Reitman* v. *Mulkey*, 387 U.S. 369, 374 (1967).)

The California Supreme Court has had much experience with antisympathy instructions, both before and after *Furman*. (See, e.g., *People* v. *Polk*, 406 P.2d 641 (1965); *People* v. *Vaughn*, 455 P.2d 122 (1969); *People* v. *Bandhauer*, 463 P.2d 408 (1970); *People* v. *Easley*, *supra*, 671 P.2d 813 *People* v. *Lanphear*, *supra*, 680 P.2d 1081.) It has seen many records containing not only various forms of such instructions but also the arguments of prosecutors built upon the anticipation of an antisympathy instruction. It is the state court which is in the best position to assess the likely significance to a juror of an antisympathy instruction in the context of the state capital sentencing scheme and the attendant standard jury instructions.

It is noteworthy to consider the prosecutor's actions and argument in this case. During voir dire the prosecutor made a point of having virtually all the jurors promise they would put aside personal feelings, including feelings of sympathy, in reaching a penalty determination. (See, e.g., JA 30-34.) Then in argument to the jury at the penalty phase, the prosecutor reminded the jurors of their promises during voir dire (JA 85-87) and repeatedly

told them that they would be instructed by the judge to put aside sympathy and they must do so. (JA 87, 89, 91-93, 95-96). He did not differentiate between untethered sympathy and sympathy tied to the evidence; quite the contrary, he expressly told the jury that the defense witnesses and evidence were nothing more than "a blatant attempt" to inject sympathy into the case, but "[a]s the Judge will instruct you, you must not be swayed by sympathy." (JA 90-91.)

Sympathy here would not be an irrational impulse unrelated to the facts of the case. On the contrary, it would be a legitimate response *to* those facts, arising from them and providing the context within which a moral assessment of the evidence and a determination of whether mercy is called for can be made.[6]

This case is not the first the California Supreme Court has seen in which the prosecutor sought to divert the jury's attention away from the mitigating evidence by arguing that sympathy and mercy were inappropriate considerations. In *People* v. *Robertson*, 655 P.2d 279, 300 (1982), "the prosecutor repeatedly told the jurors that it would be improper for them to consider defendant's 'family history' or to permit their sympathy for him to affect their penalty determination." Similarly, in *People* v. *Easley, supra*, 671 P.2d 813, 826, fn. 11, the prosecutor told the jury that sympathy was not a mitigating factor they could consider and that they were restricted to considering the factors upon which they were instructed.[7]

[6] Relying on the dissenting views of California Supreme Court Justice Mosk, the Attorney General contends that an antisympathy instruction really benefits a capital defendant in that it prevents a verdict based on sympathy for the victim. (Petitioner's Brief, pp. 59-62.) If the antisympathy instruction were limited to precluding consideration of sympathy for the victim, perhaps a defendant would benefit; but an unlimited antisympathy instruction, such as was given here, results in precluding full consideration of the defendant's mitigating evidence and can only harm a defendant's case for life. The answer lies in carefully drawn and limited instructions telling the jury they can consider their sympathetic response to the mitigating evidence.

This is the type of experience the California Supreme Court has had with antisympathy instructions and arguments. It is an experience which fully supports the court's holding in this case that the instruction operated to divert the jury from its duty to consider the mitigating evidence and clearly refutes the unsupported interpretation offered by the state that the instruction precludes the consideration of only untethered sympathy.

C. The Other Penalty Instructions Relied Upon By The State Did Not Correct The Prolems Created By The Antisympathy Instruction

In arguing that the antisymathy instruction did not withdraw consideration of respondent's mitigating evi-

[7] See Appendix A for other examples of prosecutors' arguments relative to sympathy in cases pending before the California Supreme Court.

Prosecutors are not the only ones who interpret an antisympathy instruction as meaning a defendant's background and character evidence are irrelevant to the penalty determination. Antisympathy instructions are sanctioned in Illinois. In *People* v. *Wright*, 490 N.E.2d 640 (1985), the defendant presented evidence of his troubled youth and mental illness. The trial judge, acting as sentencer, found that the evidence established there were sympathetic aspects to the defendant's character but held that he could not, by law, consider that and the defendant was sentenced to death. (See *Wright* v. *Illinois*, cert. pending in 85-6783.)

If prosecutors and judges, schooled in the law and constitutional principles, interpret antisympathy instructions as precluding consideration of a defendant's background and character evidence, it is quite likely that reasonable jurors do so also.

dence, the state repeatedly contends that the instructions given advised the jury to consider all evidence relating to the offense and the offender. (Petitioner's Brief, pp. 25, 26, 49, 53, 57-58.) The instructions were more limited than the state suggests, however.

In addition to telling the jury not to be swayed by sympathy, the instructions provided a list of factors the jury was to consider in determining penalty. (JA 21-23.) The jury was then told to reach their decision by considering the factors "upon which you have been instructed." (JA 23.)

Thus, the jury was told to restrict their consideration to the factors on the list they were given.[8] Those factors, however, deal exclusively with present and prior criminal activity and do not mention background or character evidence.

Factor (k) tells the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it it not a legal excuse for the crime." The state contends this factor includes a consideration of background and character evidence. As with his interpretation of the antisympathy instruction, the Attorney General's interpretation of factor (k) is totally unsupported and entirely inconsistent with the California Supreme Court's interpretation.

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[8] The California Supreme Court has determined that the instruction advising the jury to consider the factors upon which they have been instructed "makes clear" that consideration is limited to the specific factors listed. (*People* v. *Brown*, *supra*, 709 P.2d 440, 458; *People* v. *Boyd*, 700 P.2d 782, 790 (1985).) The Attorney General does not dispute this point; rather, his contention is that the factors listed include consideration of background and character evidence.

The California Supreme Court has held that the language of factor (k) is potentially confusing and may well preclude the jury from considering a defendant's background and character evidence. Thus, the court in 1983 ordered that factor (k) should be expanded to provide consideration of "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any other aspect of the defendant's character or record that the defendant proffers as a basis for a sentence less than death." (*People* v. *Easley*, *supra*, 671 P.2d 813, 826 fn. 10.)[9] Respondent, however, did not have the benefit of this expansion since his trial took place in 1982.

Factor (k), as given to respondent's jury, told them to consider "[a]ny other circumstance which extenuates the gravity of the crime." By its very wording, factor (k) is limited to a consideration of evidence bearing directly on the crime. Background and character evidence does not, as a general rule, bear on the crime; rather, it is the evidence a defendant proffers as the reason for a sentence less than death *in spite of* his unmitigated crime.

The best that can be said of the instruction is that it is ambiguous relative to the propriety of considering background and character evidence, but "*Woodson* and *Lockett* require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the [sentencer]." (*Eddings* v. *Oklahoma*, *supra*, 455 U.S. 104, 119 [O'Connor, J., concurring].) Because a reasonable juror could have interpreted the instruction as precluding consideration of respondent's mitigating back-

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[9] Subsequent to the *Easley* opinion, the Committee on California Jury Instructions, Criminal, modified the standard jury instruction to incorporate the *Easley* expansion. (CALJIC No. 8.84.1.)

ground and character evidence, the instruction could not have cured the problem created by the antisympathy instruction in suggesting respondent's mitigating evidence was irrelevant. (See *Sandstrom* v. *Montana*, 442 U.S. 510, 514 (1979).)

The likelihood that the jury read the instructions as foreclosing consideration of respondent's background and character evidence is heightened by the prosecutor's argument. The prosecutor clearly read factor (k) as limited to evidence which directly mitigated the crime. The prosecutor told the jury:

> "Finally, ladies and gentlemen, there is the factor of other circumstances which extenuate the gravity of the crime, even though not a legal excuse; if present, it might mitigate, if absent there is no mitigation.
>
> "There is no evidence, ladies and gentlemen, I would suggest to you, which extenuates the gravity of this crime, the killing of Susan Jordan that has been presented. No explanation, no remorse . . .
>
> "[The defense] brought to you in two days a parade of relatives who admitted that they were biased witnesses in the case, who told us a lot about the defendant from their point of view. They told us what a good boy he was at the time in his youth when they knew him. And he brought them gifts and that he cared after his siblings. *They did not testify, ladies and gentlemen, regarding any of the factors which relate to your decision in this case.*" (JA 89-90; emphasis added.)

Thus, the prosecutor read factor (k) as restricted to the crime and rendering respondent's mitigating evidence entirely irrelevant. Certainly a reasonable juror could have read the instruction the same restrictive way and

indeed probably did after listening to the prosecutor's argument.[10]

As with its interpretation of the antisympathy instruction, the California Supreme Court's interpretation of factor (k) as too restrictive to cure the impression given by the antisympathy instruction comes from its experience of reviewing the records of capital trials. The court has seen how prosecutors and trial judges interpret the instruction. The prosecutor's argument in this case is not unusual. In *People* v. *Davenport*, 710 P.2d 861, 883 (1983), for example, the prosecutor argued to the jury that evidence of the defendant's background could be considered a mitigating circumstance only if it had some relationship to the crime of which he was convicted. Similarly, in *People* v. *Robertson*, *supra*, 665 P.2d 279, 300, the prosecutor told the jury they could consider only the crime and the defendant at the time of the crime; he advised the jury that other factors, such as the evidence showing the defendant "didn't get the breaks in life," were irrelevant to their decision.[11]

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[10] Even if the factor (k) instruction adequately advised the jury of its duty to consider the mitigating evidence, it then contradicted the antisympathy instruction and error still occurred. A reasonable juror could easily have resolved the contradiction by choosing to rely on the specific antisympathy instruction and ignoring the general instruction. "Nothing in [the] specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other. Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." (*Francis* v. *Franklin*, 471 U.S. ____, 85 L.Ed.2d 344, 358 (1985).)

[11] See Appendix B for other examples of cases pending before the California Supreme Court in which prosecutors argued or judges stated that factor (k) was restricted to circumstances bearing directly on the crime.

Far from correcting the impression the antisympathy instruction and argument left the jury, the other penalty instructions reinforced the idea that respondent's mitigating evidence of his troubled upbringing and emotional disturbances was irrelevent to the penalty determination. Thus, it is probable the jury reached their determination that respondent should suffer death without ever having considered his mitigating evidence.[12]

Contrary to the state's contention (Petitioner's Brief, pp. 55-57), this Court has never upheld the California penalty instructions as consistent with *Lockett* principles. In *Pulley* v. *Harris*, 465 U.S. 37 (1984), this Court upheld the absence of a provision requiring proportionality review in the California statute in use at that time and noted the statute was constitutional "on its face." (*Id.*, at 53.) *Harris* does not consider or discuss jury instructions,

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[12] The prosecutor's argument here also violated respondent's right to due process. In *Gardner* v. *Florida*, 430 U.S. 349 (1977), this Court concluded that the defendant was denied due process because the death penalty was imposed in part of the basis of information he had no opportunity to explain or deny. More recently, in *Skipper* v. *South Carolina*, *supra*, 90 L.Ed.2d 1, the Court found a due process violation when the defendant was not allowed to introduce evidence of his good behavior in custody to answer the prosecutor's argument that he would be a danger in prison.

In this case, the prosecutor told the jury respondent's mitigating evidence was irrelevant to the penalty determination. The instructions gave respondent no opportunity to correct that inaccurate argument; to the contrary, the instructions supported the prosecutor's contentions. Thus, to the extent respondent's mitigating evidence helped explain the aggravating evidence, he was denied due process because the instructions and the prosecutor's argument denied him the benefit of his evidence, and the result was he was not given a meaningful opportunity to explain or mitigate the case for death.

their meaning, or their impact on the jury's consideration of the mitigating evidence. In *California* v. *Ramos*, *supra*, 463 U.S. 992, the Court noted that the California scheme is consistent with *Lockett* in that it allows the defendant to present any mitigating evidence he has. (*Id.*, at 1005, fn. 19.) The right to present evidence is very different than the right to have that evidence considered.[13] Respondent concedes he was allowed to present his mitigating evidence without limitation; he contends, however, that the jury instructions foreclosed *consideration* of that evidence. Neither *Harris* nor *Ramos* considered or discussed this issue.

Instructions are important to the jury's determination of the case. "It is quite simply, a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." (*Gregg* v. *Georgia*, *supra*, 428 U.S. 153, 193.) "The charge [to the jury] is that part of the whole trial which probably exercises the weightiest influence upon the jurors." (*Andres* v. *United States*, *supra*, 333 U.S. 740, 765 [Frankfurter, J., concurring].)

The Court presumes that jurors "conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." (*Francis* v. *Franklin*, *supra*, 85 L.Ed.2d 344, 359-360, fn. 9.) A determination of what a particular

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[13] *Eddings* v. *Oklahoma*, *supra*, 455 U.S. 194 recognizes the critical difference between presenting evidence and having the sentencer consider that evidence. The Oklahoma statute allowed Eddings to present evidence "as to any mitigating circumstances" (id., at 115, fn. 10) and he did present evidence of his troubled youth and emotional disturbances. (*Id.*, at 107-108.) Eddings' death judgment was vacated because the sentencer did not consider the evidence Eddings was able to present.

instruction means and whether it accorded the defendant his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction. (*Sandstrom* v. *Montana*, *supra*, 442 U.S. 510, 514.)

Instructions at the penalty phase of a capital case take on an even greater significance. In *Lockett* v. *Ohio*, *supra*, 438 U.S. 586, 605, this Court noted the importance of minimizing "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." It is this concern that compels a close examination of penalty instructions. Ambiguous instructions are simply not good enough. As Justice O'Connor has noted: "[W]e may not speculate as to whether the [sentencer] actually considered all of the mitigating factors . . . *Woodson* and *Lockett* require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered . . ." (*Eddings* v. *Oklahoma*, *supra*, 455 U.S. 104, 119 [O'Connor, J., concurring].)

When evaluated with these principles in mind, the instructions in this case fall far short of the constitutional imperative requiring jurors be advised to consider any mitigating evidence proffered by the defendant "as a basis for a sentence less than death." (*Lockett* v. *Ohio*, *supra*, 438 U.S. 586, 604.)

CONCLUSION

The issue here is a narrow one. All parties agree that respondent had a right to the jury's consideration of their sympathetic response to his mitigating background and character evidence. The only question is whether the California Supreme Court reasonably concluded that the antisympathy instruction together with the other restrictive instructions compromised that right. The state's interpretation of the instructions is entirely unsupported;

the California Supreme Court's interpretation is backed by the wording of the instructions and long experience with it.

The most important function the jury at a capital sentencing trial has is as the "link between contemporary community values and the penal system." (*Witherspoon* v. *Illinois*, *supra*, 391 U.S. 510, 520, fn. 15.) Contemporary community values require that justice be tempered with mercy. Quoting Arthur Koestler, this Court has noted: "'The test of one's humanity is whether one is able to accept this fact—not as lip service, but with the shuddering recognition of a kinship: here but for the grace of God, drop I.'" (*Id.*, at 520, fn. 17.)

It is, accordingly, the precise function of the jury at the penalty phase of a capital case to examine mitigating evidence as it appeals to their sympathies and determine whether to be compassionate and merciful. To instruct the jury that they may not consider their sympathetic response to the defendant's mitigating evidence is to tell the jury not to engage in the very task they have been empaneled to perform.

Respondent literally staked his life on the hope that his jury would consider his mitigating background and character evidence, would view the evidence sympathetically, and would decide to exercise mercy. However, the prosecutor's argument, the antisympathy instruction, and the other instructions restricing the jury's consideration to facts directly bearing on the crime withdrew respondent's evidence from the jury's consideration. "[I]t was as if the trial judge had instructed [the] jury to disregard the mitigating evidence [respondent] proffered on his behalf. The sentencer . . . may determine the weight to be given relevant mitigating evidence. But they

may not give it no weight by excluding such evidence from their consideration." (*Eddings* v. *Oklahoma*, *supra*, 455 U.S. 104, 114.)

As the California Supreme Court held, "the ambiguous tension between [the] instructions and defendant's right to sympathetic consideration of all the character and background evidence he presented requires reversal of the penalty judgment." (*People* v. *Brown*, *supra*, 709 P.2d 440, 453.) The decision below should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

EXCERPT FROM *PEOPLE* v. *ROBERTSON*, CRIM. 20577, DECIDED BY THE CALIFORNIA SUPREME COURT IN 1982 (665 P.2d 279)

From the prosecutor's closing argument to the jury:

> "Secondly, irrelevant information in this case would be a prejudice or a passion or sympathy. This is where you will have a great deal of difficulty. You, right now, are going to be wearing, so to speak, the black robes of a judge. You are responsible for listenting to the facts of this case. Ignore your own personal opinions of sympathy and prejudice and passion. It's necessary for you to do that to base it upon the facts, to have a reason for what you're doing, and to ignore sympathy, because sympathy is unreasoned." (1 ART 1046.)

* * * * *

> "Again, I will emphasize very strongly that these factors are based on facts, the testimony. Not sympathy, not Dr. Hunt's: He should get off because he didn't get the breaks in life. . . . That's a sympathy factor, a sympathy factor that does not focus on the real issue, the crime and the person Andrew Robertson was at the time the crime was committed." (1 ART 1067.)

* * * * *

> "He [defense counsel], first of all, went to the person of Andrew Robertson, giving Andrew Robertson's history, where he was born, how old he was, what he did as a young man, the fact that he went into the service. That is not a factor. That is irrelevant to your decision in this case. You must decide whether or not this crime is of the death penalty type and you must consider the actor in the crime, Andrew Robertson, as he appeared during the course of the crime, not as he appeared when he was four years old or nine years old. The fact that he did or didn't like vegetables when he was nine years old plays no part in your decision.
>
> "The reason for that is that you are asked to focus on the crime itself, what penalty is to be invoked for this type of crime." (1 ART 1099-1100.)

EXCERPT FROM *PEOPLE* v. *GATES*, CRIM. 22263, PENDING ON AUTOMATIC APPEAL IN THE CALIFORNIA SUPREME COURT

From the prosecutor's closing argument to the jury:

> "It's not a time to talk for mercy or forgiveness for Oscar Gates. It's too late for that. All throughout voir dire we talked about would you follow the law, would you base your decision on evidence received in the court, not religion, not mercy, forgiveness, philosophy, anything you personally might believe or feel, not feelings of guilt in your part or sorrow for his family.
>
> "The evidence that you received in the case, that's what you promised the judge you'd base your decision on, because the time now is not for philosophy or religion, mercy, forgiveness, sorry for the family, feelings of guilt on your own part. The time now is, I would say, a time for justice for Oscar Gates. Now is the time for an accounting finally." (RT 1286-1287.)

EXCERPT FROM *PEOPLE* v. *WALKER*, CRIM. 21707, PENDING ON AUTOMATIC APPEAL IN THE CALIFORNIA SUPREME COURT

From the prosecutor's closing argument to the jury:

> "I also mentioned, and I guess I should mention it now—I wasn't going to—the fact that there had been things here which could elicit sympathy. Things which had nothing to do with the case. Mr. Walker belongs to a large family, and those members have been present here for the jury's observations during the case. But again, obviously that has nothing to do with this case." (RT 3298.)

EXCERPT FROM *PEOPLE* v. *BOYDE*, CRIM. 22584, PENDING ON AUTOMATIC APPEAL IN THE CALIFORNIA SUPREME COURT

From the prosecutor's closing argument to the jury:

> "The process of weighing, I think, is a rational process, it is a process of being able to go through each factor, decide whether or not it aggravates or mitigates, and

> consider that factor in relation to the other factors that you'll hear, and come to a rational decision. It is not a question, I believe, that should be guided by emotion, sympathy, pity, anger, hate, or anything like that because it is not rational if you make a decision on that kind of basis." (RT 4767.)
>
> * * * * *
>
> "Secondly, the argument is a question of sympathy, sympathy is an interesting thing, because even though you try not to consider it, this decision you are going to make has emotional overtones to it. It would be very hard to completely filter out all our emotions, make the decision on a rational basis. Although the instruction says you are to try to do that." (RT 4817.)

APPENDIX B

EXCERPT FROM *PEOPLE* v. *PAYTON*, CRIM. 22511, PENDING ON AUTOMATIC APPEAL IN THE CALIFORNIA SUPREME COURT

From the prosecutor's argument to the jury:

> "K says any other circumstance which extenuates or lessens the gravity of the crime. What does that mean? That to me means some fact—okay?—some factor at the time of the offense that somehow operates to reduce the gravity for what the defendant did.
>
> "It doesn't refer to anything after the fact or later. That's particularly important here because the only defense evidence you have heard has been about this newborn Christiantiy. (RT 2121-2122.)
>
> "Referring back to 'K' which I was talking about, any other circumstances which extenuates or lessens the gravity of the crime, the only defense evidence you've heard had to do with defendant's new Christianity and that he helped the module deputies in the jail while he was in custody.
>
> "The problem with that is that evidence is well after the fact of the crime and cannot seem to me in any way to logically lessen the gravity of the offense that the defendant has committed.
>
> "[Defense counsel] will tell you that somehow that becoming a newborn Christian, if in fact he really believed that took place, makes it a less severe crime, but there is no way that can happen when—under any other circumstance which extenuates or lessens the gravity of the crime, refers—seems to refer to a fact in operation at the time of the offense.
>
> "What I am getting at, you have not heard during the past few days any legal evidence mitigation. What you've heard is just some jailhouse evidence to win your sympathy, and that's all.
>
> "You have not heard any evidence of mitigation in this trial." (RT 2125.)

From the court's ruling on defendant's motion to modify the death verdict:

> "Last, subsection K, the court should consider any other circumstance which extenuates the gravity of the crime, even though not a legal excuse. I'm aware that the People's position of the defendant's religious activity being subsequent to the offense was not relevant.
>
> "The court disagreed and allowed the jury to hear all the area regarding the defendant's religious rehabilitation and positive influence on other inmates. That defense was presented, the defendant's born again Christianity, and other conduct in prison.
>
> "As far as the court was concerned, I felt that was a proper mitigating factor to go to the trier of fact. And it was allowed.
>
> "There was also evidence of the talents the defendant possessed, such as writing. And all this was presented for the positive effect of sparing the defendant's life, and submitted to the trier.
>
> "Again, this testimony and the inference to be drawn there, they were presented to the trier of fact in the penalty phase. And in this court's opinion, it was a mitigating factor.
>
> "However, none of these witnesses Mr. Payton called could offer any explanation or any circumstance that would extenuate the gravity of the crime, or give any evidence which morally justified or extenuated the defendant's conduct in the court's position—or opinion." (16 RT 25-26.)

EXCERPT FROM *PEOPLE* v. *HAMILTON*, CRIM. 22311, PENDING ON AUTOMATIC APPEAL IN THE CALIFORNIA SUPREME COURT

From the prosecutor's argument to the jury:

> "Number eleven, any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime. Is there any justification or excuse offered on behalf of the defendant for why this crime

occurred? Obviously there is not. The evidence presented by the defendant this morning goes not to any of these eleven guidelines. What you heard this morning was evidence from people who knew the defendant well twelve years ago. None of these people knew the defendant or were with the defendant at or about the time these crimes were occurring.

"In listening to those guidelines the court has read to you, there are no circumstances in mitigation. What was presented to you this morning does not apply to any of the guidelines the court is going to read to you. . . . That's what makes your decision easy in this case is that there are no circumstances in mitigation." (19B RT 13-14.)

From the court's ruling on defendant's motion to modify the death verdict:

"I have carefully reviewed all the mitigating and aggravating circumstances set forth in 190.3 and I find that without exception all the aggravating circumstances are applicable and except for those that by their very nature have no application at all to this case, and that there is in fact from this record and what's before me, no mitigating circumstances. . . . I do not find an unhappy childhood, which certainly was the case, to be any justification or mitigating circumstance." (22 RT 13-14.)

EXCERPT FROM *PEOPLE* v. *BIGELOW*, CRIM. 22018, DECIDED BY THE CALIFORNIA SUPREME COURT IN 1984 (691 P.2d 994)

From the court's ruling on defendant's motion to modify the death verdict:

"THE COURT: Now we have a catchall K, which is any other circumstances which extenuates the gravity of the crime, even though it is not a legal excuse for the crime.

"Do you have anything you want to tell me under that factor, Mr. Bigelow?

"THE DEFENDANT: Extenuates the gravity of the crime, well, that's—would my sisters and brothers, would their testimony fall into that, my childhood, and not being

raised with proper parents, and—would that fall into extenuation of the gravity?

"THE COURT: No, I don't think that would. I don't see how your childhood, because you've evidently had a not too happy childhood, but that doesn't give you the right to come to America and take an innocent man and kill him. Does it?" (5/8/81 RT 28.)

EXCERPT FROM *PEOPLE* v. *WALKER*, CRIM. 21707, PENDING ON AUTOMATIC APPEAL IN THE CALIFORNIA SUPREME COURT

From the prosecutor's closing argument to the jury:

"The last one, any other circumstance which extenuates the gravity of the crime, even though it's not a legal excuse for the crime. You will interpret that. I think the language of this, although I'm not sure extenuates is a good, very good word there, but the language of it, I assume, is meant to say that: Is there something that makes this less serious? Makes this crime less serious than it looks when you look at the other factors in the case? Although it's not a legal excuse, again, it would be something in a theoretical case where somebody felt that the person who he killed was someone who meant harm to his family, someone who had threatened him, someone who had made life miserable. That's not legal excuse, but you couldn't do that, but it might very well be a jury could find in some way that lessened the gravity of the crime. This case, again, is exactly the opposite. You have innocent citizens. You have robberies. I'm sure you've all read about them once in awhile where things get wild, someone tries to go for a gun himself and the robber shoots, or a gun goes off or something happens and there's a tragedy and a person's life is taken, and certainly that person is guilty of what Mr. Walker is guilty of in this case. This isn't anything like this case. Exactly the opposite." (RT 3279-3280.)